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Supreme Court of the United States

October Term, 1951

No. 593

JAMES B. MAGENIS, F. W. APPLESTEIN, CHARLES A. BODIE, *et als.*,

Petitioners,

against

BOSTON RAILROAD HOLDING COMPANY, *et als.*,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

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INDEX

PAGE

STATEMENT 1

POINT I. As to the Merits of the Petition 2

POINT II. As to Petitioners' Standing in this Court 2

CONCLUSION 7

Authorities

Hinckley v. Gilman, C. & S. R. R. Co., 94 U. S. 467 4

West v. Radio-Keith-Orpheum Corp., 70 F. 2d 621 (C. C. A. 2) 3

Railroad Trainmen v. B. & O. R. Co., 331 U. S. 519 5

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Statement

This brief is submitted in reply to the brief of respondent, New York, New Haven and Hartford Railroad Company, opposing petitioners' application for a writ of certiorari herein to the Supreme Judicial Court of the Commonwealth of Massachusetts.

The petition herein relates to the same decision of the Massachusetts court as is involved in the petition of the Delaware and Hudson Company, docket number 567, presently pending before this Court.

POINT I

As to the Merits of the Petition

Petitioners feel that the merits of their position are fully covered in their petition and the brief submitted in support thereof; that the contentions made by the respondent herein are fully answered in that petition and brief; and that no purpose will be served by restating petitioners' position herein.

POINT II

As to Petitioners' Standing in this Court

Respondent urges that petitioners were not formally named as parties in the proceeding in the Massachusetts court, and that they therefore have no standing in this court. The cases cited in respondent's brief (p. 2), however, all involve situations in which the interests of the persons who sought to appeal were only indirectly affected by the decision sought to be reviewed. None of those cases presented facts such as those involved in the instant case.

In the present case the fact is, not only that the proceeding here involved is a representative suit brought on behalf of all public holders of the preferred stock of the Boston Railroad Holding Company, including the present petitioners, but that, pursuant to the order of the Massachusetts court, notice of the Delaware's petition in this proceeding was given to all stockholders of record of the Holding Company as well as to other interested parties (Record, pp. 18-19). The notice thus given to petitioners

was recognition that petitioners have a direct interest in the proceeding. There appears, moreover, to be no doubt that the determination of the Massachusetts court is binding upon petitioners, by reason of the representative character of the suit. Indeed, the decision of the Massachusetts court by its very terms declares the rights, not only of the Delaware and Hudson Company, but of all the public holders of the preferred stock of the Holding Company, including these petitioners. There can therefore be no question that the Massachusetts decision directly and explicitly adjudicates their rights as preferred stockholders and is binding upon them.

As is pointed out in the petition herein, petitioners maintain that the Massachusetts decision deprives them of rights protected by the Federal Constitution. To hold that petitioners are concluded by the decision below and that they are nevertheless remediless to seek redress for an invasion of such rights, would, we submit, itself amount to a clear deprivation of those rights.

As Judge Learned Hand has pointed out, in *West* v. *Radio-Keith-Orpheum Corp.*, 70 F. 2d 621 (C. C. A. 2), the general rule that a person not a party to a suit has no standing to appeal, is based on the assumption that such person is not concluded by the decision sought to be appealed from; and such general rule is not applicable where the person seeking to appeal is bound by the decision. That case involved a receivership proceeding affecting the defendant corporation. The receiver petitioned the court for approval of a certain proposed course of action affecting the corporation, and gave notice of the petition to all creditors of the corporation. In holding that one of the creditors, who opposed the petition, had standing to appeal from the order granting the petition, though he

was at no time formally a party to the proceeding, Judge Hand stated in part as follows (pp. 623-624):

> "* * * it is indeed well settled that generally speaking no person, not a party to a suit, may appeal. Bayard v. Lombard, 9 How. 530, 551, 13 L. Ed. 245; Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578, 32 S. Ct. 833, 56 L. Ed. 323; Louisiana v. Jack, 244 U. S. 397, 402, 37 S. Ct. 605, 61 L. Ed. 1222. The reason for this is that if not a party, the putative appellant is not concluded by the decree, and is not therefore aggrieved by it. But if the decree affects his interests, he is often allowed to appeal. This has long been true, for example, as to bidders and purchasers at a judicial sale. Blossom v. Milwaukee, etc., R. R. Co., 1 Wall. 655, 17 L. Ed. 673; Williams v. Morgan, 111 U. S. 684, 4 S. Ct. 638, 28 L. Ed. 559; Kneeland v. American Loan Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. Ed. 379. Again in Mitchell v. Lay, 48 F. (2d) 79 (C. C. A. 9), a person enjoined in a receivership suit was allowed to appeal, though not formally a party. * * * But if the creditors are concluded by such an order, the reason for refusing them an appeal ends. * * *"

Similarly, in *Hinckley* v. *Gilman, C. & S. R. R. Co.*, 94 U. S. 467, this Court upheld a right of appeal by a receiver in a foreclosure action, though he was not a party to the action, to the extent that "he had been subjected to the jurisdiction of the court, and made liable to its orders and decrees".

So in the instant case, though petitioners were not formally made parties to the proceeding, since they are nevertheless concluded by the decision below as effectually as if they had formally been named as parties, and since the court actually regarded them as parties by directing notice of the proceeding to be given to them, it is submitted that there is no basis for denying them standing to seek redress for invasion of their rights by that decision.

Petitioners respectfully ask, in the alternative, that if this Court should decide that they have no standing to petition for the writ, they should be given leave to intervene in the pending petition by the Delaware and Hudson Company for a writ of certiorari (docket number 567). There is no doubt that petitioners are aggrieved by the decision below, and that they have no remedy available to them other than by petition for writ of certiorari or by intervention. That intervention is an appropriate remedy in a case such as this, is clear from this Court's opinion in *Railroad Trainmen* v. *B. & O. R. Co.*, 331 U. S. 519, where, in distinguishing between the situation where intervention rests in discretion and the case where intervention is a matter of right, it was pointed out that the basic criterion is whether the applicant is "legally bound or prejudiced by any judgment that might be entered in the case". This Court thus declared in part as follows (331 U. S. at 524):

> "The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability. But where a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable. Then it may fairly be said that the applicant is adversely affected by the denial, there being no other way in which he can better assert the particular interest which warrants intervention in this instance. And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definiteness which supports an appeal therefrom."

Since, as pointed out above, petitioners' rights and interests as preferred stockholders are concluded by the decision below, they must have standing to bring before this Court their position—either by petition for writ of certiorari or by intervention—that the decision deprives them of rights guaranteed by the Federal Constitution. The state court should not be permitted to deprive petitioners of their rights and at the same time to foreclose them from challenging that deprivation in this Court. Indeed, as is pointed out in the petition herein (p. 7), the Massachusetts Court, in denying without prejudice petitioners' application for leave to intervene, expressed the opinion that this Court "will probably allow these parties to be heard in some form." The Massachusetts Court thus did not entirely foreclose petitioners, but left them free to seek a remedy in this Court.

The interpretation in respondent's brief (p. 3) of Mr. Justice Frankfurter's order extending the time of these petitioners to file their petition for a writ of certiorari, is entirely without substance and merits no further comment.

Respondent (brief, pp. 4-5) further attempts to becloud the issues by wholly improper and extraneous charges that "the entire litigation is a speculative enterprise on the part of the holders of the guaranteed stock". Not only is there not the slightest basis in the record for any such imputation but the fact is that the charges are entirely irrelevant to the issues before this Court. Surely an allegation that one or two of these forty-eight petitioners may be directors of the respondent company has no bearing here.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari be granted or, in the alternative, that petitioners be permitted to intervene in the pending proceeding by the Delaware and Hudson Company (docket number 567) for a writ of certiorari.

Respectfully submitted,

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